# In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1273

JOSEPH E. SHAMY, PETITIONER

*v.*

JONATHAN GOLDSTEIN, UNITED STATES ATTORNEY FOR THE DISTRICT OF NEW JERSEY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner seeks review of the refusal to enjoin respondent, the United States Attorney for the District of New Jersey, and other federal officers, from presenting certain subpoenaed corporate documents to a grand jury. Petitioner alleges that the records had been wrongfully transferred to agents of the Internal Revenue Service and requested that the court enjoin respondents from presenting or disseminating the subpoenaed documents to the grand jury, or to any other governmental entity, and order the government to return all the subpoenaed documents to him (Pet. App. 1a-2a).

After concluding that petitioner was "acutely aware of the scope of the Grand Jury's inquiry as well as the relevancy of the submitted documents" (Pet. App. 6a) and reviewing *in camera* an affidavit of an Assistant United States Attorney setting out the substance of the grand jury probe and the relevancy of the subpoenaed records (Pet. App. 6a-7a), the district court dismissed petitioner's suit, ruling that he had failed to state a claim upon which relief could be granted. The court of appeals affirmed without opinion (Pet. App. 8a-9a).

Petitioner contends: (1) that the decision below conflicts with *In re Grand Jury Proceedings*, 486 F.2d 85 (C.A. 3), and *United States* v. *Dionisio*, 410 U.S. 1; (2) that the transfer of the subpoenaed records to agents of the Internal Revenue Service violated Rule 6(e) of the Federal Rules of Criminal Procedure; and (3) that it was improper for the United States Attorney to conduct a grand jury investigation into an income tax matter until after the Internal Revenue Service referred the matter to the Department of Justice for prosecution.

1. The court of appeals correctly affirmed the district court's dismissal of the complaint for failure to state a cause of action. The essence of petitioner's claim is that the grand jury subpoena was a mere subterfuge and had been issued solely for the purpose of allowing the Internal Revenue Service to acquire the information. But the district court concluded that the grand jury was engaged in a bona fide investigation. In view of the well-recognized broad investigative powers of the grand jury (see, *e.g.*, *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643; *Blair* v. *United States*, 250 U.S. 273, 282), petitioner's unsupported claim of subterfuge could not cast doubt upon the propriety of a duly issued subpoena by that body. As the district court stated: "To hold that the target of a Grand Jury investigation could prevent the submission of evidence to a duly constituted Grand Jury on a bald allegation of subterfuge would perversely hamper the traditional investigative function of the Grand Jury" (Pet. App. 5a). See *United States* v. *Calandra*, 414 U.S. 338, 342-346. The complaint therefore failed to state a cause of action and was properly dismissed.

Furthermore, the district court required the Assistant United States Attorney to file an affidavit, for *in camera* review, setting forth the relevancy and materiality of the

subpoenaed documents to the grand jury investigation (Pet. App. 6a).[1] After reviewing the affidavit, the court concluded that "the subpoenaed documents are relevant to a legitimate Grand Jury investigation" (Pet. App. 7a) and that the subpoenaed records were properly turned over to agents of the Internal Revenue Service for its expert analysis in order to assist the grand jury in its investigation (Pet. App. 3a-5a). Contrary to petitioner's argument (Pet. 10-11), the agents' examination of the records was entirely appropriate and did not violate the rule of secrecy surrounding grand jury proceedings set forth in Rule 6(e) of the Federal Rules of Criminal Procedure. The grand jury is entitled to obtain expert advice in appraising such documentary evidence. See, *e.g.*, *In re William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464 (E.D. Pa); *In re July 1973 Grand Jury*, 374 F. Supp. 1334 (N.D. Ill.).

2. Even had there been some valid basis upon which to challenge the validity of the subpoena, petitioner did not use the normal procedure available for such a purpose. Instead, he voluntarily complied with the subpoena's command to produce the material. The peculiar procedural course followed by petitioner is evidently designed to avoid the effect of the well-settled rule that a person who seeks to resist the production of information must choose between compliance with the court's order to produce and resistance to the order, with the possibility of an adjudication of contempt if his claims are rejected

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[1]Petitioner argues (Pet. 11) that this *in camera* review deprived him of his right to examine the affidavit. When a party summoned to appear before a grand jury makes an unsupported claim that the grand jury is not engaged in a legitimate investigation, the most that can be required of the government attorney conducting the grand jury investigation is a sworn statement which satisfies the court that the grand jury has commenced a good faith criminal investigation. See *In re Kadish*, 377 F. Supp. 951, 952 (N.D. Ill.). Any further proceedings would "saddle * * * [the] grand jury with minitrials and preliminary showings [which] would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *United States* v. *Dionisio, supra*, 410 U.S. at 17. It is therefore immaterial whether the government's showing is made *in camera* or in open court.

on appeal. *United States* v. *Ryan*, 402 U.S. 530, 532-533; *Cobbledick* v. *United States*, 309 U.S. 323. Here, petitioner complied with the grand jury subpoena and only then sought to litigate the propriety of the grand jury's request in a context in which he did not have to choose between compliance and contempt. However, this compliance with the subpoena terminates any objection he might otherwise have to use of the materials by the grand jury.[2]

3. Contrary to petitioner's further contention (Pet. 8), there is no conflict with *In re Grand Jury Proceedings*, *supra*. There, the court held that before a grand jury witness could be adjudged in contempt for failure to comply with a direction of the grand jury, the government was required to make a preliminary showing that the direction was relevant to an investigation being conducted by the grand jury and properly within its jurisdiction. Here, however, petitioner complied with the direction of the grand jury by appearing and producing the subpoenaed corporate records, and the government made a preliminary showing of relevancy.[3] Moreover, even if some conflict could be discerned between the two cases, there is no need for review by this Court, since both decisions are by the same circuit.

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[2]The appropriate remedy in this context, if any, is not the injunction petitioner seeks against the grand jury's use of the subpoenaed records but an objection to their introduction against him at any subsequent criminal proceeding. See *United States* v. *Ryan*, *supra*, 402 U.S. at 532, n. 3, citing *United States* v. *Blue*, 384 U.S. 251, 255. However, given the fact that the subpoenaed documents were corporate records and not eligible for the claim of the Fifth Amendment privilege (see *e.g.*, *Wilson* v. *United States*, 221 U.S. 361), it is difficult to see how petitioner could bar their introduction at trial.

[3]*United States* v. *Dionisio*, *supra*, cited by petitioner (Pet. 9), is not to the contrary. There, the Court held that the compelled production of voice exemplars before a grand jury would not violate the witnesses' Fifth Amendment privilege or the Fourth Amendment.

4. Finally, petitioner contends (Pet. 12-13) that a grand jury may not investigate a tax matter until after the Internal Revenue Service has processed the case and referred the matter to the Department of Justice for prosecution. Petitioner cites no authority for this novel proposition, and, in fact, the power of the grand jury to indict is plenary and is not limited by internal agency regulations outlining the preliminary procedure that is usually followed. *United States* v. *Goldstein*, 342 F. Supp. 661, 668-669 (E.D. N.Y.); *In re Goldman*, 331 F. Supp. 509, 510 (W.D. Pa.). Cf. *Sullivan* v. *United States*, 348 U.S. 170. Contrary to the situation involved in *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, where the petitioner was denied a deportation hearing prescribed by regulation, the grand jury investigation of petitioner's income tax liability prior to any recommendation for prosecution by the Internal Revenue Service did not materially affect petitioner's rights. In the event of an indictment, petitioner will have available the protection of a full trial at which his guilt or innocence will be determined.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

JUNE 1975.

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